United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1901

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P/S

To be argued by
EDWARD BRODSKY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1901

UNITED STATES OF AMERICA,
Appellee,

—v.—

KARL SCHWARTZBAUM,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF IN BEHALF OF APPELLANT

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Introduction

The four counts (one of which was dismissed) of the indictment were predicated upon four alleged payments by the defendant "to Charles Hoff, an officer of the Furrier's Joint Council" (A. 5). The Government's Brief fails to note that the indictment identifies Hoff, and only Hoff, as the recipient of these alleged payments.

It is certainly true that one who indirectly, but knowingly, pays money to union officials, need not be aware of the identity of the recipient in order to violate 28 U.S.C. § 136. On the other hand, if the indictment alleges that payments were made to a particular individual, as did the indictment in the present case, then it cannot be doubted that proof of payment to a different individual will not suffice for conviction. It was, thus, incumbent for the government to prove and for the jury to believe, beyond

a reasonable doubt, that payments made by the defendant herein actually made their way to the Union official, Charles Hoff. The only proof in this case to that effect was the testimony of the government witness Glasser.

In assessing the reliability of Glasser's recollection and the truthfulness of his testimony, the jury was confronted with five possibilities, only the last of which would have justified a verdict of guilt:

1. The defendant made no payment to Glasser;

2. The defendant made payments to Glasser under the impression that he was stifling the self-policing function of the *manufacturers'* organization and that the money was, in fact, being kept by Glasser or being passed on to Glasser's superiors within that organization;

3. The defendant made the payments to Glasser with the impressions set forth under possibility number 2, but, unbeknownst to the defendant, Glasser was distributing some of this money to Union officials;

4. The defendant was making payments to Glasser under the impression that he was distributing some of the money to Union officials, but Glasser, in fact, kept all the money for himself;

5. The defendant made the payments to Glasser under the impression that Glasser was distributing the money to Union officials and Glasser did, in fact, distribute some of the money to Union officials.

It is clear, therefore, that the government had a two-fold obligation. It had to prove that the defendant actually intended the payment of funds to Union officials and that Glasser actually made the payments in question to a particular Union official, Hoff.

ARGUMENT

POINT I

The defense cannot properly be charged with a lack of due diligence.

With respect to the defendant's first motion for a new trial based on newly discovered evidence, the government contended and the trial court found that, ". . . the defendant has failed to satisfy the threshhold requirement of demonstrating that the purported newly discovered evidence could not have been with due diligence discovered either before the trial or at the latest at the trial" (A. 106). Significantly, the trial court made no similar finding with respect to the defendant's second such motion (A. 279-281).

The Government's brief in this case makes much ado about what was and was not known at the conclusion of the prior *Stofsky* trial, while at the same time remaining vague as to the particulars of the facts adduced at that trial. On the other hand, the Government's Brief in this Court in the *Stofsky* case (Docket No. 74-1860), sets forth the facts as follows:

> "Trial commenced on February 11, 1974 and on that date, pursuant to a subpeona *duces tecum*, Glasser made available to defendant's counsel a copy of his 1972 Federal joint income tax return (DX H) which declared $6,151.00 in interest payments from several savings banks [footnote omitted]. Glasser was called to testify on February 13 . . . and his testimony continued through February 14. Mrs. Glasser testified as a government witness on February 15.

> "On February 14, defendant's counsel cross-examined Glasser concerning the source of the $120,000 in deposits at the three savings banks indicated on Glasser's 1972 return, which had given rise to the interest payments reported thereon. Glasser testified that most of that $120,000 had been inherited by his wife and had been deposited in savings accounts a long time ago (A. 163a, 165a-166a, 329a *); and that from 1967-1969 he had received from the Union manufacturers a total of approximately $15,000 to $16,000, of which he had kept approximately $5000 (A. 167a). In her testimony the next day, Mrs. Glasser affirmed that in 1940, at her fathers' death, she had inherited approximately $60,000; and that in 1944, at her mother's death, she had inherited an additional $30,000 to $40,000; and that, accordingly, she and Mr. Glasser had $100,000 in savings accounts as early as 1945 (A. 181a)." (Government's Brief in *United States* v. *Stofsky, et al., supra,* at pp. 47-48).

The government goes on to describe how, during the course of the *Stofsky* trial, defense counsel in that case obtained some of Glasser's bank records, none of which revealed that deposits had been made in *cash*. The government described the events in the *Stofsky* trial, following the receipt of those records, as follows:

> "The transcript [of bank records] received by defendant's attorney on February 20 showed that the Glassers had deposited $38,156.97 in savings accounts at the East New York Savings Bank during the years 1967-1970. Glasser was recalled by the government and vigorously cross-examined by defen-

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* References in this quotation are to the Appendix filed with this Court in the *Stofsky* case.

dant's counsel on the basis of his tax returns for 1967 through 1971 supplied that day by the government to defendant's counsel (Tr. 956). Although the principal thrust of that examination sought to establish that Glasser had pocketed entirely any and all payoffs he had ever received from manufacturers, defendant's counsel made no use of the transcript that day and never sought thereafter to have Glasser recalled for further cross-examination (A. 328a-332a). Moreover defendant's counsel did not offer this transcript in evidence on defendant's own case to impeach the testimony of the Glassers concerning the source of the funds in their savings accounts. Defendant's counsel did choose to introduce at trial for this purpose probate records of the estates of Mrs. Glasser's parents (A. 601a-602a; DXs AM, AN), indicating that she had received from the estates of her father and mother approximately $1200 and $1600, respectively." (Government's Brief in *United States* v. *Stofsky, et al., supra,* at p. 48).

Based upon the government's own statement of facts in *Stofsky*, therefore, we stand upon the assertion set forth in our main Brief, at p. 34 that, to counsel in the present case, "it appeared as though both defense counsel and the government in the prior trial had had access to the bank records, and that Glasser had been interrogated to the fullest extent imaginable, all to no avail. Under these circumstances, it is respectfully submitted, neither the defendant nor his attorney [in this case] can be faulted for failing to follow the same path which had so unsuccessfully been pursued in the prior trial." That path had been blocked by Glasser's perjury as well as that of Glasser's wife and had been unfortunately hidden by the bank's failure to reveal the additional records which it possessed.

In our main Brief, at p. 34, we contended that the government's claim of a lack of due diligence in fact constitutes a self-indictment for its failure to advise the defense herein of the facts known to the government with respect to Glasser's cash deposits. *See*: *Brady* v. *Maryland*, 373 U.S. 83 (1963). Citing *United States* v. *Rosner*, 516 F.2d 269, 280 n. 5 (2d Cir., 1975), the government responds that it did not have ". . . an equal obligation to investigate leads favorable to the defendant and then turn the results of its investigation over to the defendant's counsel . . .". The *Rosner* citation is inapposite in several respects. In the first place, the situation in *Rosner* related to facts not directly relevant to innocence or guilt. In the present case and in *Stofsky*, Glasser's cash deposits directly related to the question of whether he had paid over any money whatsoever to Union officials or had kept it all to himself. In the second place, one need not even reach the question of whether the government had an obligation to investigate the leads. It certainly had the obligation of advising the defense as to the existence of the leads (i.e., the fact that very substantial cash deposits had been uncovered). We respectfully submit that the government failed in both respects, and that, when taken within context, the defense was not so lacking in diligence as to deprive the defendant of a new trial despite Glasser's now admitted perjury.

POINT II

Since the District Court was unwilling to grant a new trial based upon the established newly discovered evidence, an evidentiary hearing should have been ordered.

The government does not contest that Glasser thoroughly, repeatedly and adroitly perjured himself with respect to the source and nature of his assets. Likewise, the government does not come forward with any specific ex-

planation for the huge total cash deposits accumulated by Glasser during the relevant years. Neither the defense nor any finder of fact has had the opportunity to examine Glasser for the purpose of determining: 1) whether he kept all the money, himself, and 2) whether he can actually recall his alleged dealings with the defendant Schwartzbaum. In short, without examining Glasser it is impossible to determine whether his perjurious course made it necessary (in his view) to falsify or distort other parts of his testimony.

We respectfully submit that any fair-minded individual, when confronted with the sordid history of Glasser's brazen perjury, would demand an open hearing for the purpose of ascertaining the truth. The failure to grant such a hearing negates even the appearance of justice.

POINT III

The prosecutor should not have been permitted to "refresh" Glasser's recollection by means of a memorandum prepared by government counsel just a few days before trial. In any event, the defense should have been permitted to call one of the trial prosecutors as a witness with regard to the facts and circumstances surrounding the preparation of that memorandum.

The prosecution seeks to place upon the defense the burden of having revealed to the jury the source of the memorandum which was shown to Glasser during his trial testimony (Gov. Br., at p. 17). An examination of the trial transcript reveals that the jury could have entertained no doubt whatsoever as to the source of that memorandum. The incident arose as follows, during the prosecutor's examination of Glasser:

"Q. Did you meet with Mr. Sabetta and me the day you returned? A. The day we returned, yes.

"Q. Was that in my office? A. That was in your office, Mr. Fryman's office.

"Q. That morning that we met, was there any discussion of Mr. Schwartzbaum? A. The answer is no.***

"Q. Do you recall everything that was discussed in that session that morning? How long did that session last? A. Until about 1:00 o'clock.

* * * *

"Q. Do you recall now everything that was said in that session? A. More or less, yes.

"Q. Do you recall everything that was said about Mr. Schwartzbaum? A. Well, outside of the fact that he was not going to come up because of illness, I don't recall any discussion on Mr. Schwartzbaum at that particular time.

"Q. Mr. Glasser, I show you a document that has been marked as Government Exhibit 3511 for identification. I ask if that refreshes your recollection about ——

"[Defense counsel]: I'd like a *voir dire* with respect to this, Your Honor.

"Q. —— *what was said in that conference?*" (Tr. 221-222) [Emphasis added].

Predicated upon the above noted questions, which amounted to statements by the prosecutor, can there be any doubt that the jury realized that either Mr. Fryman or Mr. Sabetta was the author of the memorandum in question?

The government also contends that, . . . "defense counsel must establish an extremely compelling and legitimate need before he will be allowed to *force* government counsel to abandon his role as an advocate and submit to hostile cross-examination." (Gov. Br., at p. 19) [Emphasis added].

We contend that such a compelling need was established in the present case. However, the prosecution grossly overstates the situation. At Tr. 380, Mr. Fryman indicated to the Court that he had "no qualms" about testifying. Unlike many trials, where only one trial prosecutor is present and capable, an additional such prosecutor was present and an active participant in the instant case. Thus, the usual policy considerations which militate against calling trial counsel as a witness were not present in this case. In fact, Mr. Fryman, when questioning Glasser with respect to the memorandum, had already placed himself or Mr. Sabetta (depending upon the jury's impression, squarely into the facts of the interview.

CONCLUSION

For all of the above reasons, as well as those advanced in our main Brief, it is respectfully submitted that the judgment of conviction should be reversed. In the alternative, the case should be remanded to the District Court for an evidentiary hearing as to the newly discovered evidence.

Respectfully submitted,

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